No. 17-965

In The Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

HAWAII, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF KAREN KOREMATSU, JAY HIRABAYASHI, HOLLY YASUI, THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 7

ARGUMENT 13

I. THE GOVERNMENT'S CONCEPTION OF PLENARY POWER DERIVES FROM CASES INFECTED WITH RACIST AND XENOPHOBIC PREJUDICES. 13

II. *KOREMATSU*, *HIRABAYASHI*, AND *YASUI* STAND AS STARK REMINDERS OF THE NEED FOR SEARCHING JUDICIAL REVIEW WHEN THE GOVERNMENT TARGETS DISFAVORED MINORITIES IN THE NAME OF NATIONAL SECURITY. 20

III. THE GOVERNMENT'S LITIGATION STRATEGY IN THIS CASE DEMANDS THIS COURT'S VIGILANCE 33

CONCLUSION 40

TABLE OF AUTHORITIES

CASES:

Chae Chan Ping v. United States,
130 U.S. 581 (1889) 8, 14, 15

Fiallo v. Bell,
430 U.S. 787 (1977) 13

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 15, 16

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 9, 16, 17, 27

Hirabayashi v. United States,
320 U.S. 81 (1943) ..... *passim*
627 F. Supp. 1445 (W.D. Wash. 1986) 28, 31
828 F.2d 591 (9th Cir. 1987) 28, 29, 30

Kerry v. Din,
135 S. Ct. 2128 (2015) 18, 19

Kleindienst v. Mandel,
408 U.S. 753 (1972) 19, 34

Korematsu v. United States,
323 U.S. 214 (1944) ..... *passim*
584 F. Supp. 1406 (N.D. Cal. 1984) ... 12, 29, 30, 31

Landon v. Plasencia,
459 U.S. 21 (1982) 18

Reno v. Flores,
507 U.S. 292 (1993) 17, 18

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 17

United States v. Yasui,
48 F. Supp. 40 (D. Or. 1942) 24

Washington v. Trump,
847 F.3d 1151 (9th Cir. 2017) 9, 18, 19, 20

Yasui v. United States,
320 U.S. 115 (1943) 7, 24

Zadvydas v. Davis,
533 U.S. 678 (2001) 18

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012) 9

STATUTES:

An Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 21

OTHER AUTHORITIES:

Acting Secretary for Intelligence and Analysis, Dep't of Homeland Security, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* (Feb. 2017) 37

BREYER, STEPHEN, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015) 12

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Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407 (Feb. 19, 1942) 21

IRONS, PETER, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1984) 22, 27

Memorandum from J. Edgar Hoover, Dir. FBI to Francis Biddle, Att'y Gen. (Feb. 2, 1942) 29

Proclamation 4417, "An American Promise," 41 Fed. Reg. 7714 (Feb. 19, 1976) 32

Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017) 8, 35

REPORT OF CWRIC, PERSONAL JUSTICE DENIED (The Civil Liberties Public Education Fund & University of Washington Press, 1997) 32

Saito, Natsu Taylor, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003) 14

Testimony of Minoru Yasui, Nat'l Comm. for Redress, Japanese Am. Citizens League, *Comm'n on Wartime Relocation and Internment of Civilians* (1981) 22

U.S. Dep't of Justice, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011) 33

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INTERESTS OF *AMICI CURIAE*[1]

Karen Korematsu, Jay Hirabayashi, and Holly Yasui—the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui—come forward as *amici curiae* because they see the disturbing relevance of this Court's decisions in their fathers'

[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission.

infamous cases challenging the mass removal and incarceration of Japanese Americans during World War II to the serious questions raised by Presidential Proclamation No. 9645.

Minoru Yasui was a 25-year-old attorney in Portland, Oregon, when, on March 28, 1942, he intentionally defied the government's first actionable order imposing a curfew on persons of Japanese ancestry in order to challenge the order's constitutionality. Gordon Hirabayashi was a 24-year-old college senior in Seattle, Washington, when, on May 16, 1942, he similarly chose to defy the government's curfew and removal orders. Fred Korematsu was a 22-year-old welder in Oakland, California, when, on May 30, 1942, he was arrested for refusing to report for removal.

All three men brought their constitutional challenges to this Court. Deferring to the government's claim that the orders were justified by military necessity, the Court affirmed their convictions. Our Nation has since recognized that the mass removal and incarceration of Japanese Americans was wrong; the three cases have been widely condemned; and all three men have been recognized with the Presidential Medal of Freedom for their wartime courage and lifetime work advancing civil and human rights.

Their children have sought to carry forward their fathers' legacy by educating the public and, as appropriate, reminding the courts of the human toll and constitutional harms wrought by governmental actions, carried out in the name of national security,

that impact men, women, and children belonging to disfavored minority groups. Guilt, loyalty, and threat are individual attributes. Courts must be vigilant when these attributes are imputed to entire racial, religious, and/or ethnic groups. The *Hirabayashi*, *Yasui*, and *Korematsu* cases stand as important reminders of the need for courts—and especially this Court—to fulfill their essential role in our democracy by checking unfounded exercises of executive power.

The Korematsu, Hirabayashi, and Yasui families are proud to stand with the following public interest organizations:

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, the Korematsu Center works to advance justice for all through research, advocacy, and education. The Korematsu Center has a special interest in addressing government action targeting classes of persons based on race, nationality, or religion and in seeking to ensure that courts understand the historical—and, at times, unjust—underpinnings of arguments asserted to support the exercise of such executive power. The Korematsu Center does not, here or otherwise, represent the official views of Seattle University.

Asian Americans Advancing Justice ("Advancing Justice") is the national affiliation of five nonpartisan civil rights organizations whose offices are located in Washington D.C. (AAJC), San Francisco (Asian Law Caucus), Atlanta, Chicago and Los Angeles. Through direct services, impact litigation, *amicus* briefs, policy advocacy, leadership development, and capacity

building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander, and other underserved communities, including immigrant members of those communities.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities nationwide to secure human rights for all. In 1982, AALDEF supported reparations for Japanese Americans forcibly relocated and imprisoned during World War II. After 9/11, AALDEF represented more than 800 individuals from Muslim-majority countries who were called in to report to immigration authorities under the Special Registration program. AALDEF is currently providing community education and legal counseling to Asian Americans affected by the challenged Presidential Proclamation.

The Hispanic National Bar Association ("HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA is committed to advocacy on issues of importance, including immigration and protection of refugees, to the 53 million people of Hispanic heritage living in the United States.

The Japanese American Citizens League of Hawaii, Honolulu Chapter ("JACL Honolulu") draws upon Hawaii's rich, multiethnic society and strong

cultural values, but broadly focuses on addressing discrimination and intolerance towards all people victimized by injustice and prejudice. JACL Honolulu supported redress for Japanese Americans incarcerated during World War II and sponsors annual events to educate the public regarding that unjust incarceration, one of the core reasons for the founding of the JACL Honolulu chapter.

LatinoJustice PRLDEF, Inc. ("LatinoJustice") is a national civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, and voting rights. During its 45-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging governmental racial discrimination.

The National Bar Association ("NBA") is the largest and oldest association of predominantly African-American attorneys and judges in the United States. Founded in 1925 when there were only 1,000 African-American attorneys nationwide and when other national bar associations, such as the ABA, did not admit African-American attorneys, the NBA today has a membership of approximately 66,000 lawyers, judges, law professors and law students, and has over 75 affiliate chapters. Throughout its

history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession.

The South Asian Bar Association of North America ("SABA") is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. Providing a vital link for the South Asian community to the law and legal system, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Presidential Proclamation.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Often the question has been raised whether this country could wage a new war without the loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too."

Gordon Hirabayashi made that plea to the Court in 1943, as he appealed his conviction for violating military orders issued three months after the Japanese attack on Pearl Harbor. Authorized by Executive Order No. 9066, those orders led to the forced removal and incarceration of over 120,000 men, women, and children of Japanese descent living on the West Coast.

Mr. Hirabayashi did not stand alone before this Court. Minoru Yasui likewise invoked our Nation's ideals in casting his separate but related appeal as "the case of all whose parents came to our shores for a haven of refuge" and insisting that the country should respond to war and strife "in the American way and not by *** acts of injustice." Appellant Br. 55-56, *Yasui v. United States*, No. 871 (U.S. Apr. 30, 1943). The Court denied the appeals of both men. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

The following year, this Court revisited the mass removal and incarceration of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court again failed to stand as a bulwark against governmental action that

undermines core constitutional principles. By refusing to scrutinize the government's claim that its abhorrent treatment of Japanese Americans was justified by military necessity, the Court enabled the government to cover its racially discriminatory policies in the cloak of national security.

In this case, the Court is once again asked to abdicate its critical role in safeguarding fundamental freedoms. Invoking national security, the government seeks near complete deference to the President's decision to deny indefinitely all immigrant and most non-immigrant visas to nationals of six Muslim-majority countries. *See* Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("Presidential Proclamation").

The government claims it is merely asking for the application of established legal principles, but the extreme deference it seeks is not rooted in sound constitutional tradition. Rather, it rests on doctrinal tenets infected with long-repudiated racial and nativist precepts. In support of the sweeping proposition that the President's authority to exclude aliens is unbounded, the government previously invoked the so-called "plenary power" doctrine—that doctrine derives from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), which relied on pejorative racial stereotypes to eschew judicial scrutiny in upholding a law that prohibited Chinese laborers from returning to the United States after travel abroad. *Id.* at 595.

Although no longer using the term "plenary power," the government continues to assert that "any policy toward aliens"—including a decision to exclude an *entire class* of individuals based on religion and national origin—is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Gov't Br. 23 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)). As the Ninth Circuit observed, the numbing judicial passivity the government demands "runs contrary to the fundamental structure of our constitutional democracy" in which "it is the role of the judiciary to interpret the law, a duty that will sometimes require the '[r]esolution of litigation challenging the constitutional authority of one of the three branches.'" *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (alteration in original) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Even more than the early "plenary power" decisions, the shades of *Korematsu*, *Hirabayashi*, and *Yasui* lurking in the government's argument should give this Court pause. In those cases, the government's policies were ostensibly backed by the controversial "Final Report" issued by Lieutenant General John L. DeWitt, the military commander who ordered the mass removal and incarceration of Japanese Americans on the West Coast. By the time it was finally presented to this Court, the Final Report—which history revealed to be riddled with falsehoods about the national security threat posed by Japanese Americans—had been materially altered to hide the racist motivations of its author.

Here, another report, this time from the Secretary of Homeland Security, purports to justify the President's decision to exclude classes of individuals based on nationality and religion—only this time, *the government has resisted allowing even the courts to review the report*. *See* Letter to Patricia S. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit, from Sharon Swingle, Counsel for Defendants-Appellants, *re: IRAP v. Trump*, No. 17-2231 (Nov. 24, 2017) ("Fourth Circuit Letter"). That fact alone should raise alarms.

Regrettably, however, hidden and suspect government reports are far from the only similarity between this case and *Korematsu*, *Hirabayashi*, and *Yasui*. As here, in those cases, the government denied that its policies were grounded in "invidious *** discrimination" and asked the Court to take it at its word that "the security of the nation" justified blanket action against an "entire group *** at once." Gov't Br. 35, *Hirabayashi v. United States*, No. 870 (U.S. May 8, 1943). In its now infamous decisions, this Court agreed.

In *Hirabayashi*, the Court concluded that even though racial distinctions are "odious to a free people," it could not "reject as unfounded the [government's] judgment" that the measures taken against Japanese Americans were necessary. *Hirabayashi*, 320 U.S. at 99-100. Going further in *Korematsu*, the Court denied that race played any role in the government's decisions: "Cast[ing] this case into outlines of racial prejudice," the Court opined, "without reference to the real military dangers which were presented, merely confuses the

issue." 323 U.S. at 223. Accepting the government's assurance, the Court went on to find that "Korematsu was not excluded from the [West Coast] because of hostility to him or his race[,] [h]e was excluded because *** the properly constituted military authorities *** decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated *** temporarily." *Id.*

Not all members of the Court were convinced, however. Three Justices dissented, including Justice Murphy, who declared that the exclusion of Japanese Americans "falls into the ugly abyss of racism," *Korematsu*, 323 U.S. at 233, and Justice Jackson, who pointed out that the Court "had no real evidence" to support the government's assertions of military necessity. Moreover, Justice Jackson warned, the Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246.

As history has made us acutely aware, the dissenters' doubts as to the veracity of the government's assertion of military necessity were well-founded, and their recognition of the gravity of the Court's decision was prophetic. Four decades after the Court upheld their convictions, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu successfully sought to have them vacated in unprecedented *coram nobis* proceedings. Evidence presented in those cases showed that the "military urgency" on which this Court predicated its decision (and the purported justification asserted in General DeWitt's Final Report) was nothing more than a smokescreen: The real reason for the government's

deplorable treatment of Japanese Americans was not acts of espionage, but rather a baseless perception of disloyalty grounded in racial stereotypes.

With the benefit of hindsight, *Korematsu* (and by inference *Hirabayashi* and *Yasui*) "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees" and "national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Put simply, those cases "illustrate[] that it can be highly destructive of civil liberties to understand the Constitution as giving the President a blank check." STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 84 (2015).

Korematsu, *Hirabayashi*, and *Yasui* are as wrong today as they were on the day they were decided. If it were to accept the government's invitation here to abdicate its judicial responsibility, the Court would repeat its failures in those widely condemned cases. The Court should instead take this opportunity to acknowledge the historic wrong in *Korematsu*, *Hirabayashi*, and *Yasui*, and to repudiate its refusal to scrutinize the government's claim of necessity and its consequent failure to recognize the military orders' racist underpinnings. Heeding the lessons of history, the Court should subject the President's decision to meaningful judicial scrutiny and affirm the Founders' visionary principle that an independent and vigilant judiciary is a foundational element of a healthy democracy.

ARGUMENT

I. THE GOVERNMENT'S CONCEPTION OF PLENARY POWER DERIVES FROM CASES INFECTED WITH RACIST AND XENOPHOBIC PREJUDICES.

In defending the first Executive Order that sought to exclude aliens from Muslim-majority countries, the government argued that "political branches[] [have] plenary constitutional authority over foreign affairs, national security, and immigration." Gov't Emergency Mot. 15-16, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). In light of that "plenary authority," the government asserted, "[j]udicial second-guessing of the President's determination that a temporary suspension of entry of certain classes of aliens was necessary *** to protect national security *** constitute[s] an impermissible intrusion." *Id.* at 15.

Despite shedding the "plenary power" label, the government's central argument remains unchanged: The political branches' "power to *** exclude aliens" is "largely immune from judicial control." Gov't Br. 18 (ellipsis in original) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). This Court, however, has never recognized an unbridled "plenary" power in the immigration realm that would preclude judicial review. And to the extent that it has shown excessive deference to the political branches in some cases, those precedents are linked to racist attitudes from a past era that have long since fallen out of favor.

1. In *Chae Chan Ping v. United States*, known as *The Chinese Exclusion Case*, the Court upheld a

statute barring the return of Chinese laborers who had departed the United States prior to its passage. 130 U.S. at 581-582. Describing the reasons underlying the law's enactment, the Court characterized Chinese laborers as "content with the simplest fare, such as would not suffice for our laborers and artisans," and observed that they remained "strangers in the land, residing apart by themselves, *** adhering to the customs and usages of their own country," and unable "to assimilate with our people." *Id.* at 595. "The differences of race added greatly to the difficulties of the situation." *Id.* Residents of the West Coast, the Court explained, warned of an "Oriental invasion" and "saw or believed they saw *** great danger that at no distant day *** [the West] would be overrun by them, unless prompt action was taken to restrict their immigration." *Id.*

Far from applying a skeptical eye to the law in light of the clear animus motivating its passage, the Court found that "[i]f *** the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security *** its determination is conclusive upon the judiciary." *The Chinese Exclusion Case*, 130 U.S. at 606; *see also* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 15 (2003). In reality, the "right of self-preservation" that the Court validated as justification for the government's unbounded power to exclude immigrants was ethnic and racial self-

preservation, not the preservation of borders or national security. 130 U.S. at 608; *see id.* at 606 ("It matters not in what form *** aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.").

Similar racist and xenophobic attitudes are evident in decisions following *The Chinese Exclusion Case*. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 729-730 (1893) (upholding requirement that Chinese resident aliens offer "at least one credible white witness" in order to remain in the country); *id.* at 730 (noting Congress's belief that testimony from Chinese witnesses could not be credited because of "the loose notions entertained by the witnesses of the obligation of an oath" (quoting *The Chinese Exclusion Case*, 130 U.S. at 598)).

2. Even in its early plenary power decisions, however, the Court recognized that the government's sovereign authority is subject to constitutional limitations. *See The Chinese Exclusion Case*, 130 U.S. at 604 ("[S]overeign powers *** [are] restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."). Indeed, from the doctrine's inception, the Court divided over the reach of the government's power in light of those limitations.

Fong Yue Ting, which upheld a law requiring Chinese laborers residing in the United States to obtain a special certificate of residence to avoid deportation, generated three dissenting opinions. *See* 149 U.S. at 738 (Brewer, J., dissenting) ("I deny that

there is any arbitrary and unrestrained power to banish residents, even resident aliens."); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting). Even Justice Field, who authored the Court's opinion in *The Chinese Exclusion Case*, sought to limit the plenary power doctrine's application with regard to alien residents:

> As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is *** to ignore the teachings of our history *** and the language of our constitution.

Id. at 754.

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and proliferated. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court, relying on *Korematsu* (*see* note 2, *infra*), upheld a provision permitting the deportation of resident aliens who were members of the Communist Party. In dissent, Justice Douglas quoted Justice Brewer's words in *Fong Yue Ting*, observing that they "grow[] in power with the passing years":

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. *** The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History,

> before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. at 599-600.

In another McCarthy-era precedent, four Justices advocated for limitations on the plenary power doctrine. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, despite his resulting indefinite detention at Ellis Island. In dissent, Justice Black, joined by Justice Douglas, reasoned that "[n]o society is free where government makes one person's liberty depend upon the arbitrary will of another." *Id.* at 217. "Dictatorships," he observed, "have done this since time immemorial. They do now." *Id.* Justice Jackson, joined by Justice Frankfurter, added that such aliens must be "accorded procedural due process of law." *Id.* at 224.

3. Perhaps reflecting the shift away from the xenophobic and race-based characterizations prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limitations on the government's authority over immigration matters.

In *Reno v. Flores*, 507 U.S. 292 (1993), for example, the Court held that INS regulations must at least "rationally advanc[e] some legitimate

governmental purpose." *Id.* at 306. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be afforded due process in an exclusion proceeding. *Id.* at 33. And in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in response to the government's contention that "Congress has 'plenary power' to create immigration law, and *** the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," the Court observed that such "power is subject to important constitutional limitations." *Id.* at 695 (citations omitted). "[F]ocus[ing] upon those limitations," *id.*, the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns" and accordingly construed the statute at issue to avoid those problems, *id.* at 682. *See generally Washington*, 847 F.3d at 1162-1163 (collecting cases demonstrating reviewability of federal government action in immigration and national security matters).

The Court's most recent decision in this area provides further support for the conclusion that, after more than a century of erosion, the notion of plenary power over immigration is little more than a relic.

In *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court considered a due process claim arising from the denial without adequate explanation of a spouse's visa application. Although it described the power of the political branches over immigration as "plenary," Justice Kennedy's concurring opinion in *Din* made clear that courts may review an exercise of that power. *Id.* at 2139-2140. Justice Kennedy

acknowledged that the Court in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), had declined to balance the constitutional rights of American citizens injured by a visa denial against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Din*, 135 S. Ct. at 2139 (quoting *Mandel*, 408 U.S. at 766). But he explained that the Court did inquire "whether the Government had provided a 'facially legitimate and bona fide' reason for its action." *Id.* at 2140 (quoting *Mandel*, 408 U.S. at 770). And while as a general matter courts are not to "look behind" the government's asserted reason, courts should do so if the challenger has made "an affirmative showing of bad faith." *Id.* at 2141.

To be sure, Justice Kennedy's opinion in *Din* acknowledged that the political branches are entitled to wide latitude and deference in immigration matters. For that reason, the government relies heavily on *Din* and *Mandel* to argue that its assertion of a national security rationale is sufficient to justify the Presidential Proclamation and to preclude further judicial scrutiny. *See* Gov't Br. at 58-64. But, as the Ninth Circuit has recognized, *Din* (and *Mandel* before it) concerned an *individual* visa denial on the facts of that case. *Washington*, 847 F.3d at 1163-1164. By contrast, the Proclamation sets a nationwide immigration policy of denying all immigrant and most non-immigrant visas to aliens of certain nationalities. While it may be sensible for courts ordinarily to defer to the judgment of the political branches when considering the application of immigration law to a particular alien, the President's

decision to issue a broadly applicable immigration *policy*—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more searching judicial review. *See id.*

All told, modern judicial precedent supports the notion that courts have both the power and the responsibility to review Presidential Proclamation 9645. Where, as here, the Court is asked to review a far-reaching program—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—precedent and common sense demand more than an assessment of whether the government has offered a "facially legitimate and bona fide" rationale for its policy. Rather, this policy, both on its face and in light of the glaring clues as to its motivations, cries out for careful judicial scrutiny.

II. *KOREMATSU*, *HIRABAYASHI*, AND *YASUI* STAND AS STARK REMINDERS OF THE NEED FOR SEARCHING JUDICIAL REVIEW WHEN THE GOVERNMENT TARGETS DISFAVORED MINORITIES IN THE NAME OF NATIONAL SECURITY.

This Court need not look far for a reminder of the constitutional costs and human suffering that flow from the Judiciary's failure to rein in sweeping governmental action against disfavored minorities. And it need not look far for a reminder of the Executive Branch's use of national security as a pretext to discriminate against such groups. The Court need look only to its own precedents—its all

but universally condemned wartime decisions in *Korematsu*, *Hirabayashi*, and *Yasui*.

1. On February 19, 1942, President Roosevelt issued Executive Order No. 9066, authorizing the Secretary of War to designate "military areas" from which "any or all persons" could be excluded and "with respect to which, the right of any person to enter, remain in, or leave" would be subject to "whatever restrictions the Secretary of War or the appropriate Military Commander may impose." Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942). Adding its imprimatur to the Executive Order, Congress made violation of any restrictions issued thereunder a federal offense. An Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Lieutenant General John L. DeWitt, head of the Western Defense Command, used that authority to issue a series of proclamations that led to the removal and incarceration of all individuals of Japanese ancestry living in "Military Area No. 1"—an exclusion area covering the entire Pacific Coast. *Hirabayashi*, 320 U.S. at 89. A curfew order came first. Soon after, Japanese Americans were ordered to abandon their homes and communities on the West Coast for tarpaper barracks (euphemistically called "relocation centers") surrounded by barbed wire and machine gun towers in desolate areas inland. *Id.* at 90.

For different individual reasons, but sharing a deep sense of justice, Minoru Yasui, Gordon Hirabayashi, and Fred Korematsu refused to comply

with General DeWitt's orders. Yasui, a young lawyer, regarded the curfew as an affront to American constitutional values. "To make it a crime for me to do the same thing as any non-Japanese person *** solely on the basis of ancestry," he explained, "was, in my opinion, an absolutely abominable concept and wholly unacceptable." Testimony of Minoru Yasui, Nat'l Comm. for Redress, Japanese Am. Citizens League 9, *Comm'n on Wartime Relocation and Internment of Civilians* (1981). "Our law and our basic concept of justice had always been founded upon the fundamental principle that no person should be punished but for that individual's act, and not because of one's ancestry." *Id.* at 10. Convinced of the curfew's illegality, Yasui immediately defied it in order to initiate a constitutional challenge.

Hirabayashi, a student at the University of Washington, also defied the orders so that he could challenge their constitutionality, saying that he "considered it [his] duty to maintain the democratic standards for which this nation lives." PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 88 (1984).

Korematsu, a welder living in Oakland, CA, refused to obey the removal orders so that he could remain with his fiancée who was not subject to removal because she was not Japanese American. The last of the three to face arrest and prosecution, Korematsu "shared with Yasui and Hirabayashi an equal devotion to constitutional principle" and believed that the statute under which he was convicted was wrong. *Id.* at 98.

2. The constitutional challenges Yasui, Hirabayashi, and Korematsu made to the military orders soon made their way to this Court. But far from fulfilling its essential role in the constitutional structure that entrusts the Judiciary with the protection of fundamental rights, the Court set upon a path of judicial abdication that today serves as a cautionary tale.

In Hirabayashi's case, the Court elected to consider only his conviction for violating the curfew order, leaving unanswered his challenge to his conviction for failing to report to a Civil Control Station—a precursor to removal from his home in Seattle. *Hirabayashi*, 320 U.S. at 85. Harkening back to *The Chinese Exclusion Case*, the Court repeated the government's claim that "social, economic and political conditions" "intensified the[] solidarity" of Japanese Americans and "prevented their assimilation as an integral part of the white population." *Id.* at 96. Betraying no skepticism of these premises, the Court found that, in view of these and other attributes of the "isolation" of Japanese Americans and their "relatively little social intercourse *** [with] the white population," "Congress and the Executive could reasonably have concluded that these conditions *** encouraged the continued attachment of members of this group to Japan and Japanese institutions." *Id.* at 98. "Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry," the Court continued, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of

that population, whose number and strength could not be precisely and quickly ascertained." *Id.* at 99.

Having upheld the curfew in *Hirabayashi*, the Court issued only a short opinion remanding Yasui's case to the Ninth Circuit. *Yasui*, 320 U.S. at 115. Because the district court had imposed a sentence based on its determination that Yasui had renounced his American citizenship, and the government did not defend that finding, the Court remanded the matter for resentencing. *Id.* at 117. The Court thereby avoided addressing the district court's conclusion, supported by extensive analysis, that the military orders were unconstitutional as applied to citizens. *See United States v. Yasui*, 48 F. Supp. 40, 44-54 (D. Or. 1942).

The Court's third opportunity to confront the mass removal and incarceration program came a year-and-a-half later, in Korematsu's case. The Court again narrowed the issues before it, rejecting Korematsu's argument that the removal order could not be extricated from the incarceration he would inevitably face if he complied with that order. 323 U.S. at 216. Then, despite affirming that racial distinctions are "immediately suspect" and "must [be] subject *** to the most rigid scrutiny," *id.*, the Court denied, without probing examination, that the military orders were driven by racial hostility. The Court reiterated its conclusion from *Hirabayashi* that it would not substitute its judgment for that of the military authorities. "There was evidence of disloyalty on the part of some," the Court reasoned, and "the military authorities considered that the need for action was great, and time was short. We

cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Id.* at 223-224.

When the Court decided *Korematsu*, however, three members rejected the government's arguments. In vigorous dissents, Justices Murphy and Jackson sharply questioned the validity of the military justification the government advanced. Although acknowledging that the discretion of those entrusted with national security matters "must, as a matter of *** common sense, be wide," Justice Murphy declared that "it is essential that there be definite limits to military discretion" and that individuals not be "left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U.S. at 234. In his view, the exclusion order "clearly d[id] not meet th[is] test" as it relied "for its reasonableness upon the *assumption* that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage." *Id.* at 234-235 (emphasis added). In fact, as Justice Murphy noted, intelligence investigations found no evidence of Japanese American sabotage or espionage. *Id.* at 241. And even if "there were some disloyal persons of Japanese descent on the Pacific Coast," Justice Murphy reasoned, "to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group" is nothing more than "th[e] legalization of racism." *Id.* at 240-241, 242.

Justice Jackson was equally dubious of the factual basis for the government's claim that the military orders were justified. The government never

submitted General DeWitt's Final Report to the lower courts. Although the report was eventually presented to this Court, by then it was too late for development of record evidence to challenge the report or counter its assertions. Those facts were not lost on Justice Jackson, who viewed the report with skepticism. "How does the Court know," he asked, "that these orders have a reasonable basis in necessity?" 323 U.S. at 245. Pointing out that "[n]o evidence whatever on that subject ha[d] been taken by this or any other court" and that the Final Report was the subject of "sharp controversy as to [its] credibility," Justice Jackson observed that the Court had "no real evidence before it" and thus "ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Id.*

Justice Jackson saw grave dangers in the Court's opinion. While an unconstitutional military order is short-lived, he observed, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." 323 U.S. at 246. With that, Justice Jackson issued a prophetic warning: By "validat[ing] the principle of racial discrimination in criminal procedure and of transplanting American citizens," the Court had created "a loaded weapon ready for the

hand of any authority that can bring forward a plausible claim of an urgent need." *Id.*[2]

3. The dissenters' fears proved to be well-founded. Decades after this Court's decisions in *Hirabayashi*, *Yasui*, and *Korematsu*, newly discovered government records revealed not only that intelligence reports and data contradicted the claim that the mass removal and incarceration program was justified by military necessity, but also that the government knew as much when it convinced the Court to affirm the defendants' convictions.[3]

In 1983, armed with those newly discovered records, Yasui, Hirabayashi, and Korematsu filed

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[2] Justice Jackson's usage of *Korematsu* and *Hirabayashi* as precedent in *Harisiades* (*see* p. 16, *supra*), on which the government relies (Gov't Br. 18), brought this warning to life. In *Harisiades*, a noncitizen claimed that due process protected his liberties in the same way it does the rights of citizens. But *Korematsu* and *Hirabayashi*, Justice Jackson wrote, show that even citizens are unprotected from far-reaching government claims of national security. *Harisiades*, 342 U.S. at 591 & n.17 ("When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention."). Constrained by *stare decisis*, Justice Jackson applied *Korematsu* as standing precedent to reject Harisiades' constitutional claim. That application to the specific facts in *Harisiades* extended *Korematsu*'s principle of extreme deference to "new purposes"—precisely the danger Justice Jackson predicted in his "loaded weapon" warning. 323 U.S. at 246.

[3] Those records are discussed at length in *Justice at War: The Story of the Japanese American Internment Cases* by Peter Irons, *supra*, who, along with Aiko Herzig-Yoshinaga, unearthed them.

coram nobis petitions seeking to vacate their convictions. As the court found in the *Hirabayashi* case, government records showed that General DeWitt's Final Report had been materially altered in order to fabricate an acceptable factual justification for the mass removal and incarceration program. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1456-1457 (W.D. Wash. 1986). Although the version of the report presented to this Court stated that it was impossible to identify potentially disloyal Japanese Americans in the time available, a prior printed version—submitted to the War Department while the government's briefs in *Hirabayashi* and *Yasui* were being finalized—made clear that the decision to issue the challenged orders had nothing to do with urgency. Rather, General Dewitt's decision turned on his view that Japanese Americans were inherently disloyal on account of their "ties of race, intense feeling of filial piety and *** strong bonds of common tradition, culture and customs." *Id.* at 1449. "It was not that there was insufficient time in which to make such a determination" the original report stated; "a positive determination could not be made [because] an exact separation of the 'sheep and the goats' was unfeasible." *Id.* (quoting Lieutenant General John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast* ch. 2 (1942)).

Beyond exposing the racist underpinnings of General DeWitt's orders (as well as the pretextual nature of the claim of urgency), the *coram nobis* cases revealed that the government possessed information rebutting the assertion in the DeWitt Report that Japanese Americans were involved in sabotage and espionage. *Hirabayashi v. United States*, 828 F.2d

591, 601 (9th Cir. 1987). The Office of Naval Intelligence ("ONI"), which the President charged with monitoring West Coast Japanese American communities, had determined in its official report that Japanese Americans were overwhelmingly loyal and posed no security risk. ONI thus recommended handling any potential disloyalty on an individual, not group, basis. ONI found, contrary to the government's representation to this Court, that mass incarceration was unnecessary, as "individual determinations *could* be made expeditiously." *Id.* at 602 n.11 (emphasis added); *see also* IRONS, *supra*, at 203. In addition, reports from the Federal Bureau of Investigation ("FBI") and Federal Communications Commission ("FCC") directly refuted claims in the DeWitt Report that Japanese Americans were engaged in shore-to-ship signaling, intimating Japanese American espionage. *Korematsu*, 584 F. Supp. at 1417. Indeed, FBI Director Hoover wrote to Attorney General Biddle shortly before President Roosevelt issued Executive Order 9066 that the push for mass racial handling was based on politics rather than facts. Memorandum from J. Edgar Hoover, Dir. FBI to Francis Biddle, Att'y Gen. (Feb. 2, 1942).

Department of Justice attorney John Burling, co-author of the government's brief, sought to alert the Court of the FBI and FCC intelligence that directly refuted the DeWitt Report. Burling included in his brief a crucial footnote that read: "The recital [in General DeWitt's report] of the circumstances justifying the evacuation as a matter of military necessity *** is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese

ancestry, in conflict with information in the possession of the Department of Justice." *Korematsu*, 584 F. Supp. at 1417 (emphasis and citation omitted). But high-level Justice Department lawyers stopped the brief's printing. Despite Burling's vociferous protest about the DeWitt Report's "intentional falsehoods," *id.* at 1418, the footnote was diluted to near incoherence, even implying the opposite of Burling's intended message. As revised, the footnote stated:

> [The DeWitt Report] is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Gov't Br. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944). Notwithstanding an earlier warning from Justice Department lawyer Edward Ennis that failing to alert the Court to the contrary intelligence in DOJ's possession "might approximate the suppression of evidence," *Hirabayashi*, 828 F.2d at 602 n.11 (citation omitted), the Justice Department concealed from the Court this material evidence on military necessity.

In light of the evidence presented, the courts hearing Fred Korematsu and Gordon Hirabayashi's *coram nobis* cases concluded that the government's misconduct had effected "a manifest injustice" and

that the mass removal and incarceration program had been validated based on unfounded charges of treason. *Korematsu*, 584 F. Supp. at 1417; *Hirabayashi*, 627 F. Supp. at 1447.[4] In granting Korematsu's *coram nobis* petition, Judge Patel articulated the modern significance of the wartime cases:

> *Korematsu* *** stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu, 584 F. Supp. at 1420.

In vacating Korematsu, Yasui, and Hirabayashi's convictions, the *coram nobis* courts joined other governmental institutions in recognizing

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[4] In Minoru Yasui's *coram nobis* case, the court acceded to the government's request to vacate his conviction and dismiss his petition for relief without making any determinations regarding government misconduct—and without acknowledging the injustice he suffered.

the wrongs committed against Japanese Americans during World War II. In 1976, President Ford officially rescinded Executive Order 9066, explaining that "[w]e now know what we should have known then—not only was *** evacuation wrong, but Japanese-Americans were and are loyal Americans." Presidential Proclamation 4417, "An American Promise," 41 Fed. Reg. 7714 (Feb. 19, 1976). The Executive Branch also recognized the contributions of the three men who challenged the military orders. Each one received the Presidential Medal of Freedom, the nation's highest civilian honor: Fred Korematsu in 1998, Gordon Hirabayashi in 2012, and Minoru Yasui in 2015.

In 1983, after extensive hearings and research, the congressionally authorized Commission on Wartime Relocation and Internment of Civilians (CWRIC) issued a report concluding that it was not "military necessity" that underpinned the mass removal and incarceration program, but rather "race prejudice, war hysteria and a failure of political leadership." REPORT OF CWRIC, PERSONAL JUSTICE DENIED 459 (The Civil Liberties Public Education Fund & University of Washington Press, 1997). Five years later, Congress passed (and President Reagan signed) the Civil Liberties Act of 1988, which, on the CWRIC's recommendations, acknowledged the injustice of the removal and incarceration program, issued an official apology, and conferred symbolic reparations to the survivors of the incarceration centers.

Most recently, in 2011, the Acting Solicitor General confirmed what the *coram nobis* cases had

established decades earlier: This Court's wartime decisions were predicated on lies. "By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, [DOJ] had learned of a key intelligence report that undermined the rationale behind the internment. *** But the Solicitor General did not inform the Court of the report despite warnings *** that failing to alert the Court 'might approximate the suppression of evidence.' Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones." U.S. Dep't of Justice, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

III. THE GOVERNMENT'S LITIGATION STRATEGY IN THIS CASE DEMANDS THIS COURT'S VIGILANCE.

The government's arguments in this case bear a disturbing similarity to the arguments this Court accepted in *Korematsu*, *Hirabayashi*, and *Yasui*. Defending the military orders in *Hirabayashi*, the government told this Court:

> The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to

> impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once. *Certainly, it cannot be said that such a conclusion was beyond the honest judgment, reasonably exercised, of those whose duty it was to protect the Pacific Coast against attack.*

Gov't Br. 35, *Hirabayashi v. United States*, *supra* (emphasis added).

Here, the government similarly implores the Court to accept the rationale offered and not to look behind the four corners of the Presidential Proclamation to ascertain whether the policy is motivated by discriminatory animus. "The Proclamation," the government argues, "is explicitly premised on facially legitimate purposes: protecting national security and the national interest by preventing entry of persons about whom the United States lacks sufficient information to assess the risk they pose[.] *** The Proclamation thus amply establishes a 'facially legitimate and bona fide reason' for its restrictions.'" Gov't Br. 60 (quoting *Mandel*, 408 U.S. at 770).

Decades after *Korematsu*, *Hirabayashi*, and *Yasui*, however, the national security justification the government offered for its wartime policies was proven false and the real reasons for the military orders—baseless concerns about disloyalty grounded in racial stereotypes—were exposed. The government has offered no basis to believe that similar revelations about the President's decision to

exclude individuals from Muslim-majority countries will not one day come to light. To the contrary, the government's representations and litigation strategy in this case only exacerbate that grave concern.

First, although the government claims that it conducted a "worldwide review" to arrive at the decision to deny all immigrant and most non-immigrant visas to designated classes, the Proclamation's text offers reason to doubt that the review actually supports the policy. The Proclamation indicates that its *non-immigrant* visa restrictions are "in accordance with the recommendations of the Secretary of Homeland Security" based on the worldwide review. Presidential Proclamation, § 1(h)(iii). Notably, the Proclamation does not make the same claim with respect to the *immigrant* visa restrictions. *See id.* at § 1(h)(ii). The government's references to the worldwide review in its brief are similarly delicate. *See* Gov't Br. 9-10.

Second, despite the purported centrality of the worldwide review and corresponding report by the Secretary of Homeland Security, the government has gone to great lengths to shield that report from view. The government has resisted providing the report to the courts even for *in camera* inspection and has urged the courts not to "consider [its] contents" should they decide, over the government's objections, to review the report. *See* Notice of *In Camera Ex Parte* Lodging of Report Containing Classified Information and Objection to Review or Consideration of Report at 4, *State of Hawaii v.*

Trump et al., No. 17-cv-0050-DKW-KSC, ECF No. 376 (D. Haw. Oct. 13, 2017); Fourth Circuit Letter, *supra*. The government has also aggressively fought efforts to release the report publicly, arguing that it is protected from disclosure under the Freedom of Information Act ("FOIA") by the presidential communications privilege. *See, e.g.*, *Brennan Center for Justice v. U.S. Dep't of State*, No. 17-cv-7520 (S.D.N.Y. filed Oct. 2, 2017).[5]

Third, echoing the findings in the ONI, FBI and FCC reports suppressed in the wartime cases, the limited documents that have come to light pertaining to the President's exclusion decision undermine rather than affirm the purported national security justification for the ban. Following the first Executive Order suspending the entry of aliens from Muslim-majority nations, the Department of Homeland Security ("DHS") drafted a report assessing the likelihood that visitors and immigrants from those countries would commit acts of terrorism in the United States. The report concluded that "citizens of countries affected by E.O. 13769 [were]

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[5] In FOIA litigation, the government has released indexes describing the contents of the pages it continues to withhold. Those indexes indicate that the appendices for the reports on the "worldwide" review are only a few pages long. *See* Letter to Judge Paul Gardephe from AUSA Christopher Connolly, *Brennan Center for Justice v. U.S. Dep't of State*, No. 17-cv-7520 (S.D.N.Y. Feb. 23, 2018), ECF No. 31. Because the reports' appendices supposedly provide detail as to why the targeted countries' vetting systems are inadequate, the paltry page count offers additional reason for skepticism that the reports provide a sufficient justification for the President's policy.

rarely implicated in US-based terrorism" and "few of the impacted countries have terrorist groups that threaten the West." Acting Secretary for Intelligence and Analysis, DHS, *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* (Feb. 2017) (capitalization removed), https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf. In other words, little more than six months before the Secretary of Homeland Security produced a report that purports to justify the visa-denial policy, the Department concluded that the very individuals affected were unlikely to pose a threat to the United States if permitted to enter.

Parallels to the government's actions in the wartime cases have not been lost on the lower courts. Before enjoining the President's Proclamation, the District Court of Maryland asked the government: "How is this different than *Korematsu* where [the United States] relied on an executive order by the President and many years after the fact it was determined that there was information within the Justice Department that contradicted representations made to the Court"? Prelim. Inj. Hr'g Tr. at 50, *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, No. 17-cv-00361-TDC (D. Md. Oct. 16, 2017), ECF No. 217. Even when confronted with that direct question, the government refused to assure the court that the DHS report entirely supports the policies contained in the Proclamation. *See id.* at 51 ("Your Honor, I'm not going to speak to the contents of the report."). Indeed, the government *disclaimed* any obligation to tell the court whether

advisors to the President disagreed that his exclusion decision was necessary. *See id.* at 52 ("I do not think we either have the obligation or should be asked about whether there were disagreements among presidential advisors in the report and whether—what one describes as an inconsistency of what one agency thought or what another agency thought.").

The government's refusal to produce the report underlying the Proclamation, or even to assure the courts that its contents do not undermine the President's policy, offers ample reason for skepticism that the decision to exclude certain classes was based on a credible assessment of the national security threat those individuals pose. The dubious nature of the government's asserted justification raises the question whether, like in *Korematsu*, *Hirabayashi*, and *Yasui*, the decision was motivated by more nefarious considerations.

* * *

During World War II, this Court's refusal to probe the government's claim that military necessity justified the mass removal and incarceration of Japanese Americans made it unwittingly complicit in the government's deception. The Court's blank-check treatment of the Executive Branch's wartime policies—underscored by its repeated refusal to confront the most grievous aspects of those policies or to acknowledge their racist underpinnings—allowed the wrongs inflicted on Japanese Americans to continue unabated for years, and allowed the

government to avoid accountability for its egregious misconduct for decades.

Korematsu, *Hirabayashi*, and *Yasui* are powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of the courts as a check on abuses of government power, especially during times of national and international stress. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch, even in areas in which decision-makers must wield wide discretion, is incompatible with the protection of fundamental freedoms. Meaningful judicial review is an essential element of a healthy democracy.

Consistent with those principles, this Court should reject the government's invitation to abdicate its critical role in our constitutional system, subject the President's exclusion decision to searching judicial scrutiny, and stand—as Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu did—as a bulwark against governmental action that undermines core constitutional values.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted.

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